APPENDIX

FCC 70-957
52395

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

File No. BPCTI-10

LAMAR LIFE BROADCASTING COMPANY
Jackson, Mississippi

File No. BPCTI-9

CHANNEL 3 OF JACKSON, A JOINT VENTURE
Jackson, Mississippi

File No. BPCTI-11

COMMUNICATIONS IMPROVEMENT, INC.
Jackson, Mississippi

For Interim Authority

MEMORANDUM OPINION AND ORDER

Adopted: September 3, 1970; Released: September 8, 1970

By the Commission: Chairman Burch concurring and issuing a statement; Commissioners Bartley and Wells dissenting; Commissioner Robert E. Lee concurring in the result; Commissioner H. Rex Lee absent.

1. Now under consideration are the captioned applications, each seeking interim authority to operate a commercial television broadcast station on channel 3, Jackson,

Mississippi, and related pleadings in support of, or in opposition to, those applications.[1] Interim applications had been invited in a previous Order, *Lamar Life Broadcasting Company,* 20 FCC 2d 635 (1969).[2] Lamar Life Broadcasting Company (Lamar) is the present operator of station WLBT(TV) channel 3, Jackson. Channel 3 of Jackson, A Joint Venture (Venture) is composed of three applicants for regular authorization on channel 3, Jackson. The joint venture is open-ended and all applicants for regular authorization that are not already part of the joint venture have been invited to participate. Communications Improvement, Inc. (CII), is a non-applicant for regular authorization.

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[1] The related pleadings are: a petition to continue operation during the comparative hearing, filed February 3, 1970, by Lamar; a statement in support of its interim application, filed April 27, 1970, by Lamar; a statement opposing Lamar's application for interim authority, filed May 7, 1970, by Civic Communications Corporation (Civic) (Civic is an applicant for regular, but not interim, authorization on channel 3, Jackson); a response to Lamar's statement in support of its interim application, filed May 8, 1970, by Venture; a letter filed May 8, 1970, by Venture, opposing CII's application for interim authority; a petition to deny Venture's application for interim authority filed May 13, 1970, by Lamar; a petition to deny CII's application for interim authority, filed May 13, 1970, by Lamar; Lamar's reply to Venture's response and to Civic's statement, filed May 13, 1970; a letter filed May 14, 1970, by Civic, responding to Venture's letter of May 8, 1970; CII's opposition to Lamar's petition to deny and to Venture's letter of May 8, 1970, filed May 25, 1970; Venture's opposition to Lamar's petition to deny, filed May 27, 1970; a reply to CII's opposition, filed June 3, 1970, by Venture; Lamar's reply to Venture's opposition, filed June 9, 1970; Lamar's reply to CII's opposition, filed June 9, 1970; Venture's response to Lamar's reply, filed June 12, 1970; Lamar's motion to strike Venture's response, filed June 16, 1970; and Venture's opposition to the motion to strike, filed June 19, 1970. In our discretion, we accept Venture's June 12 pleading. CII has requested a waiver of the $150 filing fee. Since it proposes to operate commercially on a commercial channel, the filing fee is required and its request is denied.

[2] The cut-off date for filing interim applications was set in *Lamar Life Broadcasting Company,* 22 FCC 2d 47 (1970).

2. Lamar contends in its various pleadings that it is a renewal applicant and under section 307(d) of the Communications Act of 1934, as amended,[3] section 558(c) of the Administrative Procedure Act,[4] and section 1.62(a)(1) of the Commission's rules,[5] is entitled to continue operation on channel 3, Jackson, pending the comparative hearing and a final decision on its renewal application. Therefore, Lamar concludes that no interim authorization can be issued and that the interim applications of CII and Venture must be dismissed. Lamar has filed an interim application, but does not concede that it is required to do so.

3. Lamar's contention must be viewed in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Office of Communication of the United Church of Christ* v. *FCC,* Case No. 19,409, decided June 20, 1969, where the Court reversed and remanded the Commission's action in which it granted Lamar's application for renewal of license of station WLBT. The Court stated:

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[3] Section 307(d) provides in part; "Pending any hearing and final decision on such an application (for renewal of license) and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect."

[4] Section 558(c) provides in part; "When the licensee has made timely and sufficient application for renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."

[5] Section 1.62 provides in part; "(a)(1) Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license with respect to an activity of a continuing nature, in accordance with the provisions of section 9(b) [now section 558(c)] of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application . . ."

> We are compelled to hold, on the whole record, that the Commission's conclusion is not supported by substantial evidence. For this reason the grant of a license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license. We do refrain, however, from holding that the licensee be declared disqualified from filing a new application; the conduct of the hearing was not primarily the licensee's responsibility, although as the applicant it had the burden of proof. Moreover, the Commission necessarily did not address itself to the precise question of WLBT's qualifications to be an applicant in the new proceeding now ordered, and we hesitate to pass on this subject not considered by the Commission.
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> The Commission is directed to consider a plan for interim operation pending completion of its hearings; if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earning of the licensee should be impounded by the Commission pending final disposition of this license application. (Slip opinion, p. 13, footnote omitted.)

The statutes and the rule cited by Lamar, above, contemplate that in the normal course of events a renewal applicant will continue operation of the particular station until a final decision is rendered. If the renewal application is denied, the applicant is precluded from filing a new application for the same frequency. It is clear from the Court's decision, however, that if the Commission finds that the public interest would be better served, an interim operator other than Lamar can be authorized to operate the station prior to a final determination on Lamar's renewal application, and that Lamar can compete for the frequency.

4. In view of the possible conflict between the statutes and the Court's mandate, the Commission filed with the Court a "Petition for Rehearing or Clarification and Suggestion for Rehearing En Banc." The Commission urged that the Court:

> . . . clarify or modify its decision to provide (1) that the Commission set aside its grant of the WLBT renewal and reconsider the application and the record under an allocation of the burden of proof that is in accordance with the Court's opinion, and (2) depending on the outcome of (1) above, that in the proceeding very shortly to be held where new applicants for the channel are to be considered, WLBT may file a competing application in the form of a request for renewal of its authorization or, if it is found unqualified to receive renewal of its present authorization, that it is barred from further consideration. (Commission Brief, pp. 8-9.)

5. The Court denied rehearing in a *per curiam* decision dated September 5, 1969. The decision was accompanied by a statement by Judges McGowan and Tamm, who said, among other things:

> The Commission points to the provision of 47 U.S.C. §307(d) to the effect that, pending final disposition of a renewal application, the Commission "shall continue such license in effect." It says that this means that the licensee seeking renewal must be regarded as having continuing authority until its application has been finally disposed of adversely to it—and this last, so it is said, only the Commission can do. It is doubtful if Congress intended that a licensee should be able to remain in possession indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny . . . (Slip Opinion on rehearing, p. 3.)

Thus, in denying rehearing, the Court has, in effect, denied the contention made in our brief, and the arguments raised by Lamar here. Moreover, the Court stated that Lamar's operation on an interim basis was an alternative, not the only possibility. The language of Judges McGowan and Tamm on rehearing also indicates, in their view, that section 307(d) of the Act is not a bar to such an interim operation. We are compelled, therefore, to conclude under the direction of the Court that an interim operation other than Lamar can be authorized, and that section 307(d) of the Act is not a bar to such an interim authorization.

6. Venture contends that CII's application does not comply with section 1.592(b) of the rules[6] and with prior Court decisions; that there are unresolved public interest questions concerning the principals of CII; that there is an interrelationship between CII and Civic Communications Corporation, one of the applicants for regular authorization to operate on channel 3, Jackson; and, therefore, that CII's application should be dismissed.

7. We do not find that section 1.592(b) of the rules is a bar to the consideration of CII's application. That question

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[6] Section 1.592(b) provides: "When two or more applications for the same television assignment have been designated for hearing, the Commission may, if the public interest will be served thereby, make a conditional grant to a group composed of any two or more of the competing applicants, such grant to terminate when the successful applicant commences operation under the terms of a regular authorization. No conditional grant will be made unless all of the competing applicants have been afforded a reasonable opportunity to participate in the group seeking the conditional grant. In its application, the group shall include a special showing as to the need for the service pending operation by the successful applicant under the terms of a regular authorization; the effect, if any, of a grant on the position of any applicant which is not a member of the group; and any other factors which are deemed pertinent to the public interest judgment."

was raised in *Oak Knoll Broadcasting Corp.*, FCC 64-665, 2 RR 2d 1011 (1964). In that case we stated:

> 34. . . . The thrust of the argument is that the Commission's conditional grant rule (§1.592) does not contemplate a temporary authorization to a party not seeking regular assignment on the frequency, but specifically envisions a situation where two or more applicants are faced with a comparative hearing for regular authorization, and where public interest considerations warrant a conditional grant of one of them prior to completion of hearing. It is added that, under *Community,* [*Community Broadcasting Co., Inc.* v. *FCC,* 274 F. 2d 753, 19 RR 2047 (D.C. Cir. 1960)] conditional grants may be issued "only in circumstances which meet the Commission's own rules."
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> 33. It is true that Oak Knoll to the extent that it has no permanent aspirations on the frequency, is beyond the specific comprehension of the rule. The request, however, is consistent with the policies underlying the rule, and the fact that it is not also within the exact wording thereof is no bar to a grant. In effect, the opposing parties are arguing that, unless the Commission has anticipated a particular proposal and established precise rules permitting its grant, the proposal must inevitably be denied. This view places too broad a construction upon the *Community* pronouncement quoted above, and overlooks that the situation, rather than the rules, is usually the first to arise. To hold that the Commission is without the power of positive action in situations not anticipated by its rules would be inconsistent with the dynamic nature of the broadcasting industry and its requests, and with the basic discretion and duties conferred and prescribed by the Communications Act.[28]

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[28] Cf., e.g., sections 4(i) and 303(g) and (r). "Underlying the (Communications Act) is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process posses [sic] sufficient flexibility to adjust itself to these

In this respect, we see no decisionally significant distinction between the *Oak Knoll* case, and the case now before us.[7]

8. Venture also notes that in two previous cases involving interim authorizations,[8] the Commission, after remand from the Court, petitioned the Court for clarification or enlargement of mandate as to whether applications for interim authority by nonapplicants for the regular authorization could be considered. In each case the Court denied the Commission's petition. However, we believe that the Court's directive in this case affords considerable discretion with respect to the establishment of an interim operator. Consequently, we invited applications for interim authorization, and explicitly invited non-applicants for a regular authorization, *Lamar Life Broadcasting Company,* 20 FCC 2d 635 (1969). Thus, we are of the view that applications such as CII's are within the discretion afforded by the Court's mandate, and conclude, therefore, that its application is properly before us for consideration.

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factors . . . (It) expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." ***FCC*** **v.** ***Pottsville Broadcasting Co.,*** 309 U.S. 134.

[7] In *Community* the Court stated that one criterion that must be met before an interim authorization can be granted is the need for the service. That question was discussed in *Oak Knoll.* The question need not be discussed extensively here since the Court has directed us to consider a plan for interim operation pending the completion of the comparative hearing, apparently having reached the conclusion that the need exists. Our finding that a need for continued service exists was stated in *Lamar Life Broadcasting Company,* 20 FCC 2d 635 (1969). Recent events in Jackson, specifically, the violence on the campus of Jackson State College, confirm that finding. Reducing the number of local television outlets in Jackson from two to one at this time would fly in the face of reason.

[8] ***Community First Corporation*** v. ***FCC,*** 403 F. 2d 578, 14 RR 2d 2019 (D.C. Cir. 1968); ***Consolidated Nine, Inc.*** v. ***FCC,*** 403 F. 2d 585, 14 RR 2d 2006 (D.C. Cir. 1968).

9. Venture, by letter dated May 8, 1970, alleges that there are certain interrelationships between CII and Civic. Lamar also raises that question. Venture's position is essentially that in view of those alleged interrelationships, CII, through Civic, should be viewed as an applicant for regular authorization, and that a grant of interim authority to one of several competing regular applicants would be prejudicial to the others. In support of its position, Venture alleges that CII is financially backed by the United Church of Christ (Church of Christ); that one of CII's pleadings was mailed from the Church of Christ; that Civic, despite an earlier interest in participating in an interim operation is no longer interested and supports CII's interim application, from which Venture concludes that it is not "inconceivable" that this change is due to common interests with CII;[9] and that CII and the Church of Christ are represented by the same counsel, who serves on CII's Board of Directors. Lamar notes that Dr. Aaron Henry joined the Church of Christ in opposing Lamar's renewal in 1964 and in the renewal hearings in 1967; that both were represented by the same counsel in those proceedings; and that Dr. Henry "is now a leading principal in Civic Communications Corporation." CII readily concedes its ties with the Church of Christ and notes that it has guaranteed a line of credit to CII[10] and provided other assistance. CII states, however, that it is a separate entity and is not con-

[9] Venture's full statement is as follows: "It is not inconceivable that Civic's sudden change in attitude has been prompted by its interest in and concurrence with the objectives of Communications Improvement, Inc., in tendering its filing for interim operation of the Channel 3 facilities."

[10] CII subsequently amended its application to change its financial plan. Under that plan, a loan from a new entity has been arranged and financial support from the Church [sic] of Christ will be terminated on the effective date of the grant of an interim authorization.

trolled by the Church of Christ. CII denies that it or its principals have any interests in Civic. Civic's letter of May 14, 1970, responds to Venture's allegations. There, Civic states that it has always preferred a non-applicant for interim authorization to be the interim operator, and still holds that preference, but that it has always maintained that it would participate in a joint interim if its preference does not prevail. Civic lists various occasions where it has made its position known to other applicants for regular authorization. Civic also states that there are no interrelationships between it and CII.

10. Both Civic and CII have stated that they have no interests in one another. We find nothing in their respective applications to indicate the contrary. The Church is not an applicant for a regular or interim authorization on channel 3, Jackson, and its stated interest in this proceeding is in support of CII. Those interests are not so great as to raise a question as to the real party in interest, and no allegations are made in that regard. Thus, Venture's allegations with respect to an interrelationship between CII and the Church of Christ are of no import here. Only Venture's statements as to a change of Civic's attitude with respect to the choice of an interim operator remains to support the interrelationship between CII and Civic based on Venture's allegations. Those allegations are entirely speculative.[11] Moreover, Civic states that it has always preferred a third-party interim operator and that its preference has not changed. Since a third-party interim operator would serve to expedite the comparative hearing,

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[11] Where several conclusions can be validly drawn from a premise or premises, we must require allegations of fact supporting the conclusion the petitioner wishes us to make. While Venture's position is not "inconceivable," it is also unsupported by facts which, if true, would establish that position.

Civic's preference is quite understandable.[12] As to Lamar's allegations, it can not be denied that Dr. Henry joined the Church of Christ in the 1964 and 1967 proceedings against Lamar, and that Dr. Henry is now a leading principal in Civic. Presumably, Lamar would have us conclude that Dr. Henry was then, and is now, a leading principal in the Church of Christ, but there are no allegations to support that conclusion. In the notice of appeal to the Court of Appeals for the District of Columbia Circuit in the prior proceedings, Dr. Henry is identified as a civil rights leader and is listed as a separate party. He is not identified as a member or leader of the Church of Christ. Civic, in which Dr. Henry is now a principal, is not represented by the same counsel that represents CII and the Church of Christ. Therefore, the only interrelationship that has been established by Lamar's allegations is that Dr. Henry and the Church of Christ were once represented by the same counsel in opposing the renewal of license of station WLBT. The minor significance of that relationship is left to speculation by Lamar and Venture. The fact of the matter is that the Church of Christ has opposed a pleading filed by Civic in the Court of Appeals for the District of Columbia Circuit. This adversary position is hardly the behavior expected of two entities with significant "interrelationships." We conclude that there is no basis for finding a

[12] For example, an interim authorization was granted to a corporation comprised of eight of the nine competing applicants for channel 13, Rochester, New York, on July 3, 1962, the competing applications for regular authorization having been designated for hearing on November 15, 1961. The profits of the operation were divided among the competing applicants that formed the interim corporation. The winning applicant did not begin operation of the station until March 1, 1970, almost eight years later, a considerably longer period than usual. It is clear, therefore, that such joint interims provide no incentive for an applicant who believes he can not win to drop out of the proceeding, or for any applicant to try to expedite the proceeding.

decisionally significant interrelationship between Civic and CII.

11. Venture's May 8, 1970, letter also raises a question with respect to Dr. Aaron Shirley, Vice-President and one of 16 directors of CII. Briefly, Venture alleges that Dr. Shirley, in his role as Chairman of the Mississippi Coalition to Save Headstart, filed a complaint with the Commission stating that station WLBT's coverage of a "Headstart Rally" was inadequate;[13] that a press release concerning the complaint was prepared by the Coalition the day prior to the rally; and that station WLBT, in response to the complaint, states that the rally was covered, so that a "conflict" exists as to what occurred. Venture concludes that this matter should be resolved prior to making a public interest finding with respect to CII. CII states in response that the date on the press release was in error and that it was not prepared until after the rally; that prior conversations with the station's staff indicated that the rally itself would not be covered; that the rally was not covered live, only subsequent events; and that Dr. Shirley saw only the first draft of th complaint, not its final form.

12. A review of Lamar's response to the complaint indicates that it did not cover the rally while in progress, but did interview participants after the rally and did cover subsequent events. The UPI reports submitted by station WLBT in its response confirm that account of the events. CII's telegram to the Commission is in terms of live coverage, so that the "conflict" raised by Venture is resolved. Moreover, while the press release is dated February 27, 1970, the body of the letter states that the rally took place

[13] The complaint was also directed against television broadcast station WJTV, channel 12, Jackson, Mississippi.

on "Saturday, February 27." Saturday actually fell on the 28th. The same error appears in the body of the telegram to the Commission. This obvious and repeated failure to match the date with the day of the week supports CII's contention that an error was made. An error in number, in our view, is much more probable than in day of the week, and we are persuaded that that was the case here. In any event, the issue date of the press release was given as February 28, 1970, so that even if it were prepared on the 27th, the opportunity remained for changes or corrections. Changes were, in fact, made and the allegation that the original press release might have been prepared prior to the rally is of no consequence. Thus, we are left with a complaint that a station did not give the kind of coverage to an event that its participants thought was adequate. Therefore, we are unable to find in the events described by Venture any qualification issues that should be raised as to CII.

13. Lamar is silent as to whether it would make its facilities available to CII and Venture. Nonetheless, both propose to lease the physical facilities now used by station WLBT. Each states that it will enter into good faith negotiations to determine the terms of a lease and that it is willing to enter into binding arbitration in the event that the parties can't reach an agreement. Thus, there is a degree of uncertainty as to the funds needed to operate the station for three months.[14] However, our financial standards are not absolute. Rather, we require only a reasonable assurance that sufficient funds will be available, *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR

[14] Where stations with an established revenue history are involved, a three-month operating expense figure is used, *Orange Nine, Inc.*, 7 FCC 2d 788, 9 RR 2d 1157 (1967), rather that the one-year requirement specified in *Ultravision*.

2d 343 (1965). There are three factors that provide such reasonable assurances here. First, we note that in a previous television interim operation, a monthly rental of $25,000 was charged for the station's facilities, or $75,000 for three months. Second, each applicant has substantial funds available. And third, station WLBT shows a healthy revenue picture that we expect will substantially carry over to an interim operator. We conclude, therefore, that CII and Venture are financially qualified.

14. In addition to using the facilities now used by station WLBT, both CII and Venture indicate that they intend, insofar as is possible, to use the existing employees of the station for staffing the interim operation. Since that course of action would minimize job losses and the resultant disruption of personnel, we approve of that representation and would expect Venture and CII to abide by their undertaking, *Community First Corp.*, 15 FCC 2d 822, 15 RR 2d 358 (1969), *Consolidated Nine, Inc.*, 15 FCC 2d 825, 15 RR 2d 361 (1969). However, Lamar notes that its employees and studios are used jointly for its AM, FM, television and other non-broadcast activities. Lamar concludes that CII and Venture, because of this joint use, can not implement their proposals. We give this factor little weight. In any situation where an interim operator takes over operation of a station from a previous operator transitional difficulties will be expected. However, the use of the existing staff and facilities are the most expeditious means for easing a transition from one group to another, and provides the foundation for implementation of their program proposals. Present employees will presumably be offered jobs with the new interim operator, which they may accept or decline as they see fit. We would expect that those whose work is primarily with the radio stations or non-broadcast operations would choose to remain with

those activities. Lamar's conclusion to the contrary notwithstanding, an accommodation, in our view, can be reached as to physical facilities. We conclude that the difficulties raised by Lamar do not bar a grant of interim authorization to Venture or CII.

15. In view of the above, we find that each of the applicants for interim authority is legally, technically, financially and otherwise qualified to operate on channel 3, Jackson, on an interim basis. We turn, therefore, to the comparative aspects of their respective applications. We base our decision on the information contained in the applications and the related pleadings. We indicated that no oral argument or hearing would be held in selecting the interim operator in a prior decision, *Lamar Life Broadcasting Company,* 22 FCC 2d 47 (1970). Lamar states that it "reserves the right to challenge the legality of this procedure." However, we believe the information we have before us is sufficient to make our determination. Moreover, this proceeding has gone on for some time and there is a need for expedition. In this regard, we note that there is a stay of proceedings before the Court of Appeals awaiting the issuance of this decision. We believe, therefore, that the procedure we use is appropriate in the circumstances presented.

16. Based upon the information contained in the respective interim applications and the related pleadings, we have concluded that the public interest would be best served by a grant of CII's application. CII is not an applicant for regular authorization and its principals have no interests in any of the applicants for regular authorization.[15] Thus, its proposal avoids any possible prejudice

[15] It is stated, but without supporting affidavit, that Rev. Kenneth L. Dean, President of CII, in his position as Executive Di-

to the applicants whose mutually exclusive applications have been designated for hearing, and is in keeping with the principles enunciated in *Community Broadcasting Co., Inc.* v. *FCC*, 274 F. 2d 753, 19 RR 2047 (1960).[16] The lack of prejudice is of controlling comparative significance and outweighs all other comparative factors, see *Oak Knoll Broadcasting Corp.*, above. The Court did state that we had available the alternative of permitting Lamar to be

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rector of the Council on Human Relations in Jackson, has contacts with principals of each of the regular applicants. These are not, however, the sort of contacts that tend toward a unity of interest that would be created by financial, business or familial ties.

[16] The *Community* case essentially stands for the proposition that a grant of interim authority to one of several applicants for regular authorization has strong tendencies to be prejudicial. Such a grant, therefore, can only be countenanced where there are strong public interest considerations counterbalancing the potential prejudice. That construction and operation of a station during a comparative hearing " . . . may weigh in the balance of an otherwise close question is not a challenge to the good faith integrity of the triers; it is a recognition that they are mortal men," (footnote omitted) 274 F.2d at 759, 19 RR at 2052. The *Community* case arose in the situation where the interim operator would have committed substantial funds to construct a new facility. In our view, however, the possibility of prejudice is present where, as here, initial construction costs are not involved, *Oak Knoll*, above. The role of the incumbent and performance during the interim period can not be assumed to be free of potential prejudice. *Beloit Broadcasters, Inc.* v. *FCC*, 365 F. 2d 962, 7 RR 2d 2155 (1966), and other decisions cited by Venture involving an interim operation for the frequency utilized by radio station KWK, St. Louis, Missouri, should be distinguished for two reasons. First, we did not have an applicant there, such as CII here, for interim authority having no interest in obtaining a regular authorization. CII's presence affords us a choice with the least potential prejudice. And second, the joint interim corporation in the *Beloit* case was comprised of seven applicants for regular authorization. "The diffused composition of RTEI (the interim corporation) minimized the likelihood of significant prejudice to the ultimate disposition of the frequency resulting from an interim grant to it." 365 F. 2d at 963-4, 7 RR 2d at 2157. With only three certain applicants joining in the proposed joint interim operation here, the "diffusion" is significantly less.

the interim operator, if we found that the public interest would be served thereby. That statement could be construed to indicate that *Community* considerations would not be applied to this proceeding with respect to Lamar. However, we note that the Court did not discuss the *Community* case and may not have considered its applicability in this situation. The Court did state that Lamar is to be considered in the comparative hearing, " . . . on even terms as nearly may be, with any other applicant," *United Church of Christ* v. *FCC*, Case No. 19,409, Order denying rehearing, p. 2. The Court may well not have anticipated that a non-applicant for regular authorization would apply for interim authorization. Since we do have CII's application before us, and since its grant would place all applicants on an equal footing in the comparative hearing, no possibility of prejudice to the outcome of the hearing is presented and the public interest is, therefore, better served. Accordingly, we believe that our decision is consistent with the Court's mandate in the present case and the *Community* decision.

17. Joint interim operations, in our experience, see footnote 12, above, raise problems by their very nature. Operation of the station is left in the hands of adversary groups resulting in poorer management and a nebulous locus of responsibility. They also tend to prolong the proceedings. Thus, there is further reason for preferring CII over Venture.

18. With respect to net profits, CII states:

> If interim authority is granted, Improvement (CII) will donate the entire net profits of operation to non-profit organizations engaged in activities relating to broadcasting, primarily in Mississippi. Plans include the donation of about one half of the net profits to

> finance the development of educational television in the State of Mississippi. The allocation of funds for this purpose will be arrived at in consultation with the organizations engaged in planning and operating non-commercial educational facilities in the State. Improvement will also seek to develop and support a communications training facility at a predominantly Negro college, preferably in Mississippi. Improvement intends to administer its grant program in such manner as to avoid any influence or control over the program content or staffing of either the educational television stations or the educational institution.

We also note that CII's officers and directors will not be remunerated for their services in their respective capacities. We generally approve of CII's plans. However, the channel is assigned to Mississippi, and its revenues are derived primarily for the service it provides to the residents of the state. Therefore, we believe that the net profits should be distributed in Mississippi. There are operating Mississippi educational broadcast stations, and several universities and colleges where a communications training facility can be developed, so that such a requirement imposes no unduly restrictive limitation. The grant of CII's authorization will, therefore, be conditioned accordingly. So that we can review CII's disposition of profits, and its conformity with this condition and its own representations, we shall require CII to submit, on a semiannual basis, a balance sheet, a revenue statement, and a statement as to the disposition of net profits.

19. We have proceeded on the assumption that Lamar will make its facilities available to an interim operator on a reasonable basis. Since Lamar is a corporation and has an obligation to its shareholders, we have every reason to believe that it would not permit its television facilities to

lie fallow. We will take whatever further action is warranted if Lamar does not make its facilities available or demands unreasonable terms. To permit time to negotiate those terms, we will make the effective date of the grant of CII's application at 3:00 a.m., thirty days from the release of this Order. At the same time, we will terminate Lamar's temporary authorization.

20. Accordingly, IT IS ORDERED that the application (BPCTI-9) of Channel 3 of Jackson, A Joint Venture, and the application (BPCTI-10) and petition to continue operation of Lamar Life Broadcasting Company ARE DENIED.

21. IT IS FURTHER ORDERED that the application of Communications Improvement, Inc., (BPCTI-11) IS GRANTED in accordance with specifications to be issued, subject to the following conditions:

A. That Communications Improvement, Inc., shall submit on a semiannual basis, a balance sheet, a revenue statement, and a statement as to the disposition of net profits.

B. That net profits shall be distributed within the State of Mississippi, as provided in paragraph 18, above.

22. IT IS FURTHER ORDERED that the grant of Communications Improvement, Inc.'s application IS EFFECTIVE at 3:00 a.m., thirty (30) days from the release of this Order, and concurrently, Lamar Life Broadcasting Company's temporary authorization IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

* See attached Concurring Statement of Chairman Burch.

CONCURRING STATEMENT OF CHAIRMAN BURCH

While I join in this decision, I believe it appropriate to set forth briefly my reasons for doing so. I find this a difficult case. There are substantial considerations militating for a different course. However, we do not write on a clean slate here. This case, above all other Commission cases, is controlled, I believe, by past Court decisions. My present action is thus dictated by the past.

First, the background of the matter: In its June 20, 1969 decision in *Office of Communication of the United Church of Christ* v. *F.C.C.*, —— U.S. App. D.C. ——, 425 F. 2d 543, the Court of Appeals held that the Commission's previous conclusion that the present license should be renewed was not supported by substantial evidence. It directed that the Commission forthwith vacate its grant of a renewal of license to Lamar and invite new applications for the license. The Court further held that because the Commission had "botched" the hearing, Lamar also should be permitted to compete in the new hearing to be held. In a concluding paragraph, the Court stated that the Commission could permit Lamar to carry on an interim operation if it found that to be in the public interest, and left to the Commission's discretion the question of the interim operation.[1]

The Commission sought reconsideration, stressing the statutory scheme and particularly the applicability of Section 307(d) (i.e., that there must be a determination as to whether a renewal application should be granted; that if that determination is adverse to Lamar, it must cease

[1] While at first blush there would thus appear to be considerable discretion vested in the Commission as to its action in this area, analysis establishes that this is not the case. Rather, in a situation where there are competing applications, including for the interim operation, past Court precedents do dictate the result. See ensuing discussion.

operation and cannot compete in any new hearing for Channel 3; and that if the determination is favorable to Lamar or not yet definitively made, Lamar is entitled, under Section 307(d), to continue operating during any hearing on competing applications). The Court denied rehearing on September 5, 1969. In its statement accompanying the order denying rehearing, the Court stated its intention that Lamar should compete for the new license "on even terms as nearly as may be, with any other applicant," and that, as to the Section 307(d) argument, Lamar was at best, "a licensee in name only, and it is presumably in such light that the licensee here involved will take its place among competing applicants." (425 F. 2d 543, 551.)

This, then, is the pertinent background against which we must evaluate the three pending interim proposals (i.e., Lamar; Jackson, A Joint Venture; Communications Improvement, Inc.). As between the latter two, I think the public interest is better served by the grant of Communications Improvement, Inc., for the reasons noted in *Florida-Georgia Television Co., Inc.*, 9 FCC 2d 235, 239 (1967). The more difficult issue is whether to disrupt the existing operation at all, during the pendency of the hearing. The substitution of any new interim operator will be disruptive to some significant extent; the disadvantages of such disruption could well be compounded here where there is a joint TV-aural broadcasting operation, housed in a single unit.[2]

However, the issue is one which must be resolved based on what the public interest standard calls for in these unusual circumstances, and, as stated, pertinent Court decisions do compel a particular answer. The Court has

[2] As an incidental point, I would stress that whether Lamar or Joint Venture were given the interim authorization, the profits should in any event not be available to the interim operator (or operators) but rather be given to local educational TV entities.

stressed that Lamar is at best "a licensee in name only" and should compete for the new license "on even terms as nearly as may be . . . " In closely analogous situations, the Court has further made clear what the above prescription entails. The situation before us appears to me, now that we have additional applicants, to be governed by *Consolidated Nine, Inc.* v. *F.C.C.,* 131 U.S. App. D.C. 179, 403 F. 2d 585 (C.A.D.C., 1968), and *Community First Corporation* v. *F.C.C.,* 131 U.S. App. D.C. 172, 403 F. 2d 578 (C.A.D.C. 1968). In each of these cases a license grant was set aside even though the license holder was not found disqualified, the Commission was directed to accept new applications, and in the new proceedings the existing operator was to "compete . . . on a completely equal and in no sense a preferred basis . . . " (*Jacksonville Broadcasting Corp.* v. *F.C.C.,* 121 U.S. App. D.C. 69, 75, 348 F. 2d 75, 81, certiorari denied, 382 U.S. 893 (1965). In each case, the Court, expanding upon its ruling in *Community Broadcasting Co., Inc.* v. *F.C.C.,* 107 U.S. App. D.C. 95, 274 F. 2d 753 (C.A.D.C., 1960), held that it was an abuse of discretion for the Commission to authorize an interim operation to be conducted solely by the party whose license had been vacated. In view of these cases and the Court's clear directive that Lamar, "a licensee in name only," compete on even terms with other applicants, I believe that our course is mandated. I accordingly join in the majority's disposition of the matter.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,613—September Term, 1970

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION.

CIVIC COMMUNICATIONS CORPORATION, JACKSON TELEVISION, INC., DIXIE NATIONAL BROADCASTING CORPORATION, COMMUNICATIONS IMPROVEMENT, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

ORDER

On consideration of the motion of appellant Lamar Life Broadcasting Company for stay pending appeal, and of the responsive pleadings filed with respect thereto, for immediate decision on the merits or, alternatively, for certification of the issue to the Supreme Court of the United States and on consideration of the motion of appellant Lamar Life Broadcasting Company to consolidate the above entitled case with numbers 23,921 and 23,953, it is

ORDERED by the Court that appellant's motion for immediate decision on the merits is granted and the order of the Federal Communications Commission, appealed from herein, is hereby affirmed, and it is

FURTHER ORDERED by the Court that the remaining motions filed in the above entitled case are dismissed as moot.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 17 1971
Nathan J. Paulson
CLERK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,409

Decided June 20, 1969

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, AARON HENRY, ROBERT L. T. SMITH, and UNITED CHURCH OF CHRIST AT TOUGALOO,

Appellants,

—v.—

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

LAMAR LIFE BROADCASTING COMPANY,

Intervenor.

ON PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION SUBSEQUENT TO REMAND

Mr. Earle K. Moore, with whom *Mr. Henry F. Lerch* and *Mrs. Ann Aldrich* were on the brief, for appellants.

Mr. Stuart F. Feldstein, Counsel, Federal Communications Commission, with whom *Messrs. Henry Geller,* General Counsel, and *John H. Conlin,* Associate General Counsel, Federal Communications Commission, were on the brief, for appellee. *Mr. Howard J. Braun,* Counsel, Federal Communications Commission at the time the record was filed, also entered an appearance for appellee.

Mr. Paul A. Porter, with whom *Mr. Reed Miller* was on the brief, for intervenor.

Messrs. Peter L. Koff and *Lawrence Speiser* filed a brief on behalf of American Civil Liberties Union as *amicus curiae* urging reversal.

Before BURGER, McGOWAN and TAMM, *Circuit Judges.*

BURGER, *Circuit Judge*: This case returns to the Court again after hearings held pursuant to an earlier opinion of this Court in which we directed that intervenors representing segments of the licensee's listening public were to be permitted to intervene and participate.[1] No additional intervenors thereafter sought to take part in the Commission proceedings.[2]

The action of this Court in remanding for hearings with listening-public intervenors taking part followed the Commission's 1965 action which granted the licensee a "probationary" one year license.[3] This unusual Commission action underscored that in the proceedings involving the application for a three-year renewal (from 1964 to 1967) the Commission had not been able to conclude that the licensee met the burden of showing that renewal of its license for three years was in the public interest.

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[1] Office of Communication of the United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

[2] The fact that no additional intervenors brought their case to the Commission substantiates our earlier observation that:

> The fears of regulatory agencies that their process will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the cost burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases.

Church of Christ, *supra* note 1 at 340, 359 F.2d at 1006.

[3] Lamar Life Broadcasting Co., 38 F.C.C. 1143 (1965).

Following various complaints filed with it, in 1962 the Commission had initiated its own field investigation into the programing operations of certain Mississippi broadcast stations, including WLBT. This investigation precipitated a July 25, 1963, letter from the Commission requesting the licensee's comments on listed questions as to its programing policies and set forth some of the specific findings of the field investigation on these matters. The Commission's consideration of WLBT's reply was pending when the licensee filed an application for renewal of its license for the June 1, 1964 to June 1, 1967 period.

In reviewing these responses prior to its award of the one-year probationary grant, the Commission noted, *inter alia:*

> The question is rather whether the licensee complied with the requirements of the fairness doctrine—i.e., whether, having presented one side of a controversial issue of public importance, it sought affirmatively to encourage and implement the presentation of contrasting viewpoints. *The licensee's response is not fully satisfactory in this respect.*
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> * * *
>
> In short, when a fairness complaint is made, a licensee relying upon network programs to balance local broadcasts has the burden of demonstrating that the network shows carried by it did present contrasting viewpoints to those expressed in the local broadcasts. *That showing has not been made here.*

Lamar Life Broadcasting Co., supra note 3 at 1146, 1147-48 (emphasis added).

Moreover, in setting forth the specific conditions attached to its one-year probationary award, the Commission provided:

> (iv) *That the licensee immediately cease discriminatory programing patterns.* Thus, it is up to the licensee to make the programing judgment whether or not to have a daily 1-minute devotional program at noon, in which appearances are rotated among the area churches in the area on the basis of race. Such a practice is obviously inconsistent with the public interest; indeed, we note that the licensee does not try to defend it.

Id. at 1154 (emphasis added).

In discussing the Commission's action we noted that the Commission had found that the licensee's prior conduct prevented the grant of a full term license.[4]

When the matter was again before the Commission on our remand, therefore, it was in a posture that the licensee had yet to demonstrate that it was in the public interest for the license to be renewed. This was a less favorable posture for the licensee than would have been the case absent the "probationary license" grant. This is important, but its significance seems to have eluded the hearing Examiner and the Commission as well; we emphasize this now to remove any lingering doubts as to our evaluation of a "probationary" grant—a grant which by its nature assumes that the renewal-licensee has been unable to persuade the Commission that it is presently in the public interest to

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[4] At that time we observed:

> The Commission in this Court argues that it accepted all Appellant's allegations of WLBT's misconduct and that for this reason no hearing was necessary. Yet the Commission recognized that WLBT's past behavior, as described by Appellants, would preclude the statutory finding of public interest necessary for license renewal; hence its grant of the one-year license on the policy ground that there was an urgent need at the time for a properly run station in Jackson must have been predicated on a belief that the need was so great as to warrant the risk that WLBT might continue its improper conduct.

Church of Christ, *supra* note 1 at 341, 359 F.2d at 1007.

grant a three-year renewal. That the Examiner failed to grasp this fact is reflected throughout his report and noticeably in his statement that

> "the evidentiary hearing . . . presented [Appellants] ample and sufficient opportunity to come forward and *sustain their serious allegations* that they had made against the applicant. They have woefully failed to do so . . ."

Lamar Life Broadcasting Co., 14 F.C.C.2d 495, 549 (1967) (emphasis added).

Since the Commission itself had previously found that some of these "serious allegations" were sufficient to withhold the grant of the traditional three-year license, the Examiner's approach, and its subsequent adoption by the Commission, signifies an attitude considerably at odds with the Commission's earlier action in refusing a three-year license. The Examiner seems to have regarded Appellants as "plaintiffs" and the licensee as "defendant," with burdens of proof allocated accordingly. This tack, though possibly fostered by the Commission's own action,[5] was

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[5] In setting the hearing following our remand, the Commission, on May 26, 1966, designated the hearing issues to be:

> (a) Whether station WLBT has afforded reasonable opportunity for the discussion of conflicting views on issues of public importance;
>
> (b) Whether station WLBT has afforded reasonable opportunity for the use of its broadcasting facilities by the significant groups comprising the community of its service area;
>
> (c) Whether station WLBT has acted in good faith with respect to the presentation of programs dealing with the issue of racial discrimination, and, particularly, whether it has misrepresented to the public or the Commission with respect to the presentation of such programing.
>
> (d) Whether in light of all the evidence a grant of the application for renewal of license of Station WLBT would serve the public interest, convenience, or necessity.

In the designation Order, the Commission explained:

> 10. Pursuant to the rule announced in *D & E Broadcasting Company*, 1 FCC 2d 78 (1965), and in accordance with the

a grave misreading of our holding on this question.[6] We did not intend that intervenors representing a public interest be treated as interlopers. Rather, if analogues can be useful, a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.

This was all the more true here because prior to the efforts of the actively participating intervenors, the Com-

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> statutory mandate of Section 309(e), the burden of proof as to issues (a) and (b) shall be upon the intervenors, the burden of proof as to issue (c) shall be upon the Broadcast Bureau, and the burden of proof as to issue (d) shall be upon the applicant.

Lamar Life Broadcasting Co., 3 F.C.C. 2d 784 (1966).

[6] Prior to the initiation of the evidentiary hearing we denied Appellants' motion for clarification of our earlier opinion; however, in a memorandum statement accompanying the denial we noted:

> In our view it should not be necessary, and certainly is not desirable, for this court to supervise the details of conduct of hearings before the Commission by the device of periodic revision of the language used in opinions. Only the most extraordinary circumstances would warrant our intervention by this means; such circumstances do not exist here inasmuch as, in respect of paragraphs 9 and 10, respectively, of the Commission's order released May 25, 1966, *we assume that* (1) the Commission's concept of evidence of past performance which, in its words, "is not unduly remote in time" is commensurate with what was, in our words, "a history of programming misconduct of the kind alleged" occasioning our remand, and (2) *the Commission's reference to "the burden of proof" in respect of issues (a), (b), and (c) is intended to mean only the burden of going forward with evidence in the first instance.*

Church of Christ, No. 19,409 (D.C. Cir., Filed November 18, 1966) (emphasis added).

mission itself had long since found the licensee wanting.[7] It was not the correct role of the Examiner or the Commission to sit back and simply provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.

A curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct of the evidentiary hearing. An example of this is found in his reaction to evidence of a monitoring study conducted by Appellants for about one week in 1964 and which was the subject of two days of testimony at the hearing. The Examiner's conclusion was that the play-back had "virtually no meaning for the simple reason that it was not . . . fair and equitable. [It] is worthless and therefore *completely discounted* for any consideration by the hearing examiner." 14 F.C.C.2d at 543 (emphasis added). In context or out, this reaction is difficult to comprehend.[8] The Commission has often com-

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[7] In connection with WLBT's 1959 renewal applications, the Commission had found specific failures to comply with the demands of the Fairness Doctrine, but did not withhold a renewal on the grounds that they were "isolated violations." *See* Lamar Life Broadcasting Co., *supra* note 3 at 1145.

[8] The following excerpts from the hearing transcript illustrate the licensee's success in placing an unrealistic burden on the Intervenors. Mrs. Elizabeth Ewing, who prepared the monitoring study exhibits on behalf of Appellants was the witness:

> Q. Could you tell from the tape whether the news of, well say, Dick Sanders, whether he was reading from United Press International wirecopy? Do you know what that is?
> A. Yes.
> Q. Could you tell whether he was reading from UPI wirecopy or from a transcript that he, himself, had prepared?
> A. No.
> Q. Did you make any identifications where the source of information was coming from?
> A. No.
>
> • • •
>
> Q. Have you ever lived in Jackson, Mississippi?
> A. No, I have not.

(*continued on following page*)

plained—and no doubt justifiably so—that it cannot monitor licensees in any meaningful way; here a 7-day monitoring, made at no public expense, was presented by a public interest intervenor and was dismissed as "worthless" by the Commission.

Concerning the cutting off of a network program relied on by Intervenors as showing violations of the Fairness Doctrine the Examiner found: "There is not one iota of evidence in the record that supports any such allegation." Yet in the transcript of proceedings we find testimony identifying the program which was admittedly cut off. The record shows the following:

Q. Did you receive any instructions as to what would be of interest to the people in Jackson, Mississippi?

A. No.

Q. Did you study any documents or books or papers to find out what would be of interest to the people in Jackson, Mississippi?

A. No.

Q. Did you read Jackson newspapers during this period in March 1964?

A. No.

* * *

Q. Do you know whether or not Dick Sanders was quoting a press release from the Department of Justice?

A. No.

Q. Do you know whether he was quoting directly from the wire service?

A. No, I don't.

Joint Appendix 172, 183-84, 187 [hereinafter J.A.].

This witness had already produced evidence of the contents of the monitored broadcasts, yet she was pursued to ascertain the *source* of these programs—the type of information particularly in the control and at the disposal of a broadcast licensee. In evaluating Mrs. Ewing's testimony, the Examiner pursued the same tack, discrediting the study and the testimonial evidence to support it without ever placing on the licensee the affirmative burden of producing evidence to establish either the true source of the programing materials or, as compared to that of Mrs. Ewing, its own sensitivity to the needs and interests of portions of its listening audience.

Q. Did you recognize the lunch counter?

A. I recognized the Woolworth Counter where the demonstration occurred here and the picture immediately disappeared. I picked up the telephone and immediately called WLBT—

Q. With whom did you speak?

A. The man refused to identify himself. I did not identify myself. I said, "Did you cut that off because that showed those Negroes sitting in at Woolworth's in Jackson?" *The man said, "Yes."*

Mr. George: *I object.* I may be anticipating but I will object to any statement as to the reply.

Presiding Examiner: *That is correct. We will sustain that portion of it. You can't quote some undisclosed person.*

The portion of the answer is stricken where he was quoting some unidentified person which is sheer hearsay.[9]

J.A. 720-21 (emphasis added).

On allegations that at least two of the licensee's commentators used disparaging terms with reference to Negroes there was testimony of listeners who said they heard these episodes; in his initial decision the Examiner noted that "[a]t least three of the [Appellants'] witnesses" so testified. Nevertheless, the Examiner chose to belittle this evidence:

> Because of the conflicting testimony respecting Ellis [one of WLBT's commentators], there is no finding made as whether he did or did not use the word "nigger" or "negra". But the evidence is undisputed that Alon Bee did use the expressions "negra" or "nigger" at some indefinite time in the past while

[9] Conceivably a licensee might be justified, in some circumstances, to decline to carry a program it regarded as inflammatory because of current tensions; if placed on that basis and reasonable exercise of such discretion presumably would be sustained by the Commission.

> broadcasting over station WLBT. *A glaring weakness of the intervenors' evidence here is that, as in many of their allegations, they did not pinpoint specific times when certain events supposedly occurred, thereby unfairly depriving the applicant of an opportunity properly to rebut such allegations.*

14 F.C.C.2d at 510 (emphasis added).

It is not our function to determine whether this would have supported a finding that the licensee had violated the Fairness Doctrine but the Examiner's erroneous concept of the burden of proof shows a failure to grasp the distinction between "allegations" and testimonial evidence, and prevented the development of a satisfactory record.

The infinite potential of broadcasting to influence American life renders somewhat irrelevant the semantics of whether broadcasting is or is not to be described as a public utility. By whatever name or classification, broadcasters are temporary permittees—fiduciaries—of a great public resource and they must meet the highest standards which are embraced in the public interest concept. The Fairness Doctrine plays a very large role in assuring that the public resource granted to licensees at no cost will be used in the public interest. In short, we do not determine how the factors we have discussed should have been weighed by the Commission but only that they had some probative value and should have been considered. To borrow a phrase from the Examiner, his response manifests a "glaring weakness" in his grasp of the function and purpose of the hearing and the public duties of the Commission.

We need not continue recitals from the record or examples of similar situations which shed light on the nature of the hearings; in our view the entire hearing was permeated by similar treatment of the efforts of the intervenors, and the pervasive impatience—if not hostility—of the Examiner

is a constant factor which made fair and impartial consideration impossible. The Commission and the Examiners have an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest. The Public Intervenors, who were performing a public service under a mandate of this court, were entitled to a more hospitable reception in the performance of that function. As we view the record the Examiner tended to impede the exploration of the very issues which we would reasonably expect the Commission itself would have initiated; an ally was regard as an opponent.

The Commission, except as modified on some minor points, adopted the Examiner's Initial Decision: "[W]e are in agreement with the examiner's conclusions that the intervenors failed to corroborate or substantiate virtually all of their allegations upon which the hearing was predicated . . . ." *Lamar Life Broadcasting Co.*, 14 F.C.C.2d 431, 433 (1968). In a footnote to this resolution, the Commission notes:

> 8. Since our decision is based on the preponderance of evidence adduced at the hearing, we are of the opinion that the intervenors' argument that they only had the burden of going forward with evidence in the first instance on hearing issues (a) and (b), that the Broadcast Bureau only had the burden of going forward on issue (c), and that the station had the actual burden of proof on those issues, is mooted.

In this respect, we think it important to set forth what the trial Examiner understood the burdens of proof to be, for his understanding on this point profoundly affected his crediting or dismissing what was in essence *testimonial evidence* although he constantly characterized the evidence as "allegations":

> Mr. Moore [Counsel for appellants]: . . . I just want to state for the record that as I understand the burden of proof, the burden of proof on all issues is on the station and the only burden on the applicant [sic; should be intervenors] and the Bureau is the burden of going forward.
>
> That is my understanding of the interpretation which has been placed on the Commission's order by the Court of Appeals.
>
> Presiding Examiner: No, that is not my interpretation. My interpretation is, by the Commission action, is *that the burden of proof is primarily upon the intervenors* on issues A and B, on the Broadcast Bureau on C and on the applicant on D, and you can't by waving the magic wand, shift the burden of proof to this applicant or to the Bureau.

J.A. 304-05 (emphasis added).

That this concept of the allocation of the burden of proof permeated the Commission's final resolution can be seen in its constant references to the Public Intervenor's failure to "prove" its "charges". As the Commission noted in closing: "We only conclude that the intervenors have failed to prove their charges and that the preponderance of the evidence before us establishes that WLBT has afforded reasonable opportunity for the use of its facilities by the significant community groups comprising its service area." 14 F.C.C.2d at 437-38. Once again we see the pervasiveness of the original error in confusing mere "allegations" and testimonial evidence—evidence which if not contradicted by the licensee's evidence, or on its face incredible, was entitled to carry the day in terms of establishing the point to which it was directed.

The Examiner and the Commission appear to have overlooked the 1965 Memorandum Opinion and Order of the Commission which contains much to the contrary to its

present position;[10] moreover, the practical effect of the Commission's action was to place on the Public Intervenors the entire burden of showing that the licensee was not qualified to be granted a renewal. The Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate[11] and at worst a profound hostility to the participation of the Public Intervenors and their efforts.[12]

The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rul-

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[10] *See* note 4 *supra.*

[11] *See* note 6 *supra.*

[12] Two members of the Commission seemed to read the record much as we read it now. In a further statement filed by Commissioners Cox and Johnson in response to the majority's "further statement" in response to the original dissent, the dissenting Commissioners noted:

> We remain perplexed by our colleagues' interpretation of the burden of proof issue, notwithstanding their attempt to further elucidate this problem in the further statement. As we noted in our dissenting opinion, the court of appeals clearly expressed its expectation that the Commission would resolve the problem by placing upon petitioners [Public Interest Intervenors] "only the burden of going forward with evidence in the first instance." By the strictures of the Communications Act of 1934, it is the licensee who is obligated to prove that renewal of his license is in the public interest, convenience, or necessity.
>
> Our colleagues maintain that, "neither the burden of going forward with the evidence nor the burden of nonpersuasion [is] * * * discharged by the party on whom it may fall by the simple making of charges and/or allegations." Needless to say, we have not suggested that "simple charges and/or allegations" are adequate. However, under their construction, it almost seems that presumptions favoring the licensee arise as to each of the issues contained in the pleadings; and, thus, as to the ultimate issue of public interest. This rule of procedure is plainly unjust and flatly contradictory of the court's memorandum respecting the burden of proof questions, a fact noted in our dissent and not disputed by the further statement.

Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 487 (1968).

ings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.

The Commission itself, with more specific documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965 and now finds the grant of a full three-year license to be in the public interest.

We are compelled to hold, on the whole record, that the Commission's conclusion is not supported by substantial evidence. For this reason the grant of a license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license. We do refrain, however, from holding that the licensee be declared disqualified from filing a new application; the conduct of the hearing was not primarily the licensee's responsibility, although as the applicant it had the burden of proof. Moreover, the Commission necessarily did not address itself to the precise question of WLBT's qualifications to be an applicant in the new proceeding now ordered, and we hesitate to pass on this subject not considered by the Commission.

The Commission is directed to consider a plan for interim operation pending completion of its hearings; if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earnings of the licensee should be impounded by the Commission pending final disposition of this license application.[13]

Reversed and remanded for further proceedings in accordance with this opinion.

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[13] We are aware that in the ordinary course the license granted by the Commission would expire on June 1, 1970.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,409

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, AARON HENRY, ROBERT L. T. SMITH, and UNITED CHURCH OF CHRIST AT TOUGALOO,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

LAMAR LIFE BROADCASTING COMPANY,

Intervenor.

ON PETITIONS FOR REHEARING OR CLARIFICATION AND SUGGESTIONS FOR REHEARING *en banc*

Dated September 5, 1969

Mr. Henry F. Lerch and *Mrs. Ann Aldrich* were on the pleadings, for appellants.

Messrs. Henry Geller, General Counsel and *John H. Conlin,* Associate General Counsel, Federal Communications Commission, were on the pleadings, for appellee. *Messrs. Howard J. Braun,* Counsel, at the time the record was filed, and *Stuart F. Feldstein,* Counsel, Federal Communications Commission, also entered appearances for appellee.

Messrs. Paul A. Porter, Reed Miller, Dennis G. Lyons, and *Robert D. Rosenbaum* were on the pleadings, for intervenor.

Before BAZELON, *Chief Judge,* and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON and ROBB, *Circuit Judges,* in Chambers.

ORDER

On consideration of the petitions filed herein by counsel for the Federal Communications Commission and intervenor, Lamar Life Broadcasting Company, for rehearing, for clarification of the Court's opinion and of the suggestions for rehearing *en banc,* it is

ORDERED by the Court, insofar as the aforesaid petitions are directed to the assigned division of this Court, that said petitions be denied, and it is

FURTHER ORDERED by the Court *en banc,* there not being a majority of the judges of this circuit in favor of having this case reheard by the Court sitting *en banc* that the suggestions for *en banc* hearing are denied.

Per Curiam.

STATEMENT OF JUDGES MCGOWAN AND TAMM ACCOMPANYING VOTE TO DENY THE PETITION OF THE FEDERAL COMMUNICATIONS COMMISSION FOR REHEARING BY THE PANEL OR EN BANC.

The essential conclusion of the division which heard this case was that the record compiled upon remand was, because of the misconceptions of the Trial Examiner, in no state to admit of an informed and reliable finding as to whether the renewal sought was in the public interest. Since

the licensee has not in over six years established its right to continue to be entrusted with this valuable public asset, the opinion understandably expressed some impatience with this state of affairs, although it recognized that the ineptitude of the Commission was as much, if not more, to blame for this scandalous delay than was the licensee. For this reason, the division was not disposed to declare the licensee ineligible to seek new authority to use the channel. It did think that the licensee should compete for that authority, on even terms as nearly as may be, with any other applicant.

The Commission professes concern that the court has improperly arrogated to itself a decision which assertedly is committed only to the Commission, namely, the denial of the license renewal application because the licensee is not qualified under any circumstances, in terms of the public interest, to have the channel. Had that been the division's purpose, it would not have contemplated that the licensee could be one of the competing applicants. What was held was that the proceedings on remand had been hopelessly bungled and that the public interest was best served by taking note of the early expiration date* and getting on with a new hearing in which the Commission can decide who is best qualified to have this channel. The Commission knows full well how to do this under its existing powers, without interruption of the present service if that is deemed important and on such terms as it thinks fit.

The Commission points to the provision of 47 U.S.C. § 307(d) to the effect that, pending final disposition of a renewal application, the Commission "shall continue such

* The license grant under review terminates June 1, 1970, and proceedings to determine who should be the licensee for the term beginning on that date would have to get under way in ample time before that.

license in effect." It says that this means that the licensee seeking renewal must be regarded as having continuing authority until its application has been finally disposed of adversely to it—and this last, so it is said, only the Commission can do. It is doubtful if Congress intended that a licensee should be able to remain in possession indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny. A licensee holding over on any such basis is, at best, a licensee in name only, and it is presumably in such light that the licensee here involved will take its place among competing applicants.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON, D. C. 20001

April 29, 1971

No. 24,613—*Lamar Life Broadcasting Co.* v. *FCC*

David H. Lloyd, Esq.
1229—19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Lloyd:

Enclosed is a copy of the order denying your petition for rehearing. Your suggestion that this case be reheard by the Court *en banc* was transmitted to the full Court.

The purpose of this letter is to inform you that there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc,* it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

NJP/bja
Enc.

cc: RICHARD WILEY, Esq.
MARTIN E. FIRESTONE, Esq.
EARLE K. MOORE, Esq.
WILLIAM H. BORGHESANI, JR., Esq.
JOSEPH F. HENNESSEY, Esq.
WILLIAM P. BERNTON, Esq.
THOMAS H. WALL, Esq.
FORBES BLAIR, Esq.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 24,613

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION.

CIVIC COMMUNICATIONS CORPORATION, JACKSON TELEVISION, INC., DIXIE NATIONAL BROADCASTING CORPORATION, COMMUNICATIONS IMPROVEMENT, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court.

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED APR 30 1971
Nathan J. Paulson
CLERK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,613

September Term, 1970

United States Court of Appeals
for the District of Columbia Circuit
FILED MAY 14 1971
Nathan J. Paulson
CLERK

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION.

CIVIC COMMUNICATIONS CORPORATION, JACKSON TELEVISION, INC., DIXIE NATIONAL BROADCASTING CORPORATION, COMMUNICATIONS IMPROVEMENT, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

ORDER

On consideration of appellant's motion to stay mandate, and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that the motion be granted and the Clerk is directed to stay the issuance of the mandate in the above entitled case to and including May 30, 1971. Said stay to be subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Per Curiam